Utility Incentives Legislative Summary

Background

Increased environmental compliance and mitigation costs and the high cost of constructing utility generation and transmission facilities have prompted many utility regulators to permit and/or require regulated utility companies to offer rebates and financial incentives to their customers to reduce electricity or gas demand on the utility systems. Incentives vary from no-cost energy studies to major financial contributions for project accomplishment.

Significant changes in the way electricity is supplied and sold are also expected over the next several years as industry restructuring occurs. This will lead to greater competition among electric utilities and increased customer service, making incentive programs even more attractive. It is in the government's best interest to take advantage of these incentives as they are made available.

Several legislative authorities permit and encourage Federal government agencies to participate in these utility programs and take advantage of the resulting incentives.

Legislation

Executive Order 12759 of April 17, 1991, directed each agency to review procedures to participate in demand side management programs offered by public utilities and remove any impediments to receiving and utilizing services, incentives, and rebates offered by those programs. The Energy Policy Act of 1992, Public Law 102-486, further directed agencies to take maximum advantage of such services provided by public utilities to reduce energy use and cost to the Government. Executive Order 13123 (EO 13123) directs Federal agencies to utilize utility demand side management programs, in addition to other forms of innovative financing and contractual mechanisms, to meet the goals of the Energy Policy Act and the order. EO 13123 contains greenhouse gas emission reduction goals and additional energy efficiency goals, addresses water efficiency, and encourages the increased use of renewables.

Section 152(f) of the Energy Policy Act amended section 546 of the National Energy Conservation Policy Act, 42 U.S.C. 8256, as follows:

(c) Utility Incentive Programs—

(1) Agencies are authorized and encouraged to participate in programs to increase energy efficiency and for water conservation or the management of electricity demand conducted by gas, water, or electric utilities and generally available to customers of such utilities.

(2) Each agency may accept any financial incentive, goods, or services generally available from any such utility, to increase energy efficiency or to conserve water or manage electricity demand.

(3) Each agency is encouraged to enter into negotiations with electric, water, and gas utilities to design cost-effective demand management and conservation incentive programs to address the unique needs of facilities utilized by such agency.

(4) If an agency satisfies the criteria which generally apply to other customers of a utility incentive program, such agency may not be denied collection of rebates or other incentives.

In addition, Section 401 of Executive Order 12902, *Energy Efficiency and Water Conservation at Federal Facilities*, states:

In addition to available appropriations, agencies shall utilize innovative financing and contractual mechanisms, including, but not limited to, utility demand side management programs, shared energy savings performance contracts, and energy saving performance contracts, to meet the goals and requirements of the act and this order.

The Energy Policy Act and executive order authorities apply to all Federal agencies, although there are also specific statutes that apply only to components of the Department of Defense. This includes:

- Section 2851 of Public Law 101-510, codified as 10 U.S.C. 2865, which states that the Secretary of Defense shall permit and encourage military departments, defense agencies, and other components of the Department of Defense to participate in programs conducted by any gas or electric utility for the management of electrical demand or for energy conservation.

- Section 2801 of Public Law 102-484 amended 10 U.S.C. 2865 to allow military installations to enter into agreements with gas or electric utilities to design and implement cost-effective demand and conservation incentive programs in order to address the requirements and circumstances of the installation. If such an agreement between the utility and installation provides for the utility to advance financing costs for the design or implementation of a program to be repaid by the United States, the cost of such advance may be recovered by the utility under terms no less favorable than those applicable to its most favored customer. Subject to availability of funds, any repayment of the costs of such advance shall be made from funds available for the purchase of utility services.

An additional authority that relates to Utility Contracting is 48 CFR part 41 - Acquisition of Utility Services:

> Part 41 of the Federal Acquisition Regulations (FAR) addresses the policies and authorities for acquisition of utility services by the Federal government. It covers the statutory authority of the General Services Administration (GSA) to prescribe policies and methods governing the acquisition and supply of utility services for Federal agencies and the delegated authority to specific agencies to purchase utility services. It also covers the use of area-wide contracts for the purchase of utility services.

Additional Policy Guidance

To establish a coordinated and integrated strategy for participation in utility incentive programs, the Department of Defense issued Defense Energy Program Policy Memorandum (DEPPM) 94-1, Participation in Public Utility Sponsored Energy Conservation and Demand Side Management Programs. The DEPPM clearly states that the objective for participation in utility incentive programs is to maximize energy and dollar savings. It establishes the guidelines for participation in programs offered by or to be negotiated with public utilities. Specifically, DEPPM 94-1 provides guidance on:

- Entrance into agreements with utility companies for facility energy conservation audits, at no cost or obligation to the government, with such audits to be conducted either by the utility company or contractors selected and paid by them.

- Application for, and acceptance of, approved financial incentives, such as energy efficient equipment rebates or project feasibility study and implementation of cost sharing programs, offered by utility companies.

- Direct negotiation with utility companies or contractors approved and competitively selected by utilities for the installation of improved energy efficiency, demand or energy reduction equipment, where utility incentives cover a portion or the entire amount of implementation costs.

- Direct negotiation with utility companies for the development of energy conservation / demand side management programs not currently available.

- Development of an implementation plan to maximize the participation in such programs by all component installations.

The DEPPM further promulgates the Defense policy that all DoD installations actively investigate and participate in energy conservation / demand side management programs offered by their utility companies, when determined to be economically advantageous based on the life-cycle costs and benefits of the proposed measures. Since many such mutually beneficial programs are time sensitive, actions should be taken immediately by installations to contact their appropriate utilities contracting authority to coordinate participation wherever advantageous to the Federal government.

The Alternative Financing Policy Committee, a subcommittee of the Interagency Energy Management Task Force, has developed a guidance memorandum on Authority to Sole Source Utility Service Contracts. The objective of the memorandum is to provide clarification to Federal agency personnel in the field so that they can quickly take advantage of opportunities to implement energy efficiency and water conservation utility contracts of this nature.

The guidance memorandum concludes that section 152(f) of the Energy Policy Act provides the authority to award sole source utility service contracts to obtain demand side management services by meeting the criteria of one exception under the Competition in Contracting Act of 1984. That exception is contained in 41 U.S.C. 253(c)(5), which provides that a civilian agency may use other than competitive procedures when a statute expressly authorizes or requires that the procurement be made from a specified source.

For components of the Department of Defense, the language of 10 U.S.C. 2865 and DEPPM 94-1 provides the military departments and defense agencies with clear authorization to sole source with their utilities for these types of services.

This guidance allows Federal agencies to use existing or new utility contract authority for energy services where competition is not required but may be used when desired. This allows agencies to participate in energy efficiency and water conservation programs conducted by gas, water, or electric utilities that are generally available to all customers of such utilities.

The subcommittee also has completed another memorandum that addresses congressional notification for utility projects under the authority of section 152 of the Energy Policy Act of 1992 (EPAct). The guidance from this memorandum indicates there is no indication in any of the laws, regulations, or policies that congressional notification is required in utility contracting. Therefore, any Federal agency may enter into a utility contract, as allowed under section 152 of EPAct without congressional notification. By comparison, projects initiated under energy saving performance contracting that exceed $750,000 do require congressional notification.

Other memoranda currently under development address the issues of accounting for operating & maintenance (O&M) cost savings, and the contract length allowed for these types of utility contracts. Other topics that will be addressed by the subcommittee include the following:

- Retention of savings;
- Ability to finance/borrow money from utilities;
- Definition of the term "utility incentive";
- Augmentation of funds;
- Avoided cost;
- Methods for repaying utilities;
- Difference between measured versus metered savings; and
- Unregulated versus regulated entities and the services they can provide.

For more information, please contact FEMP liaison Mary Colvin of the National Renewable Energy Laboratory at 303-384-7511.

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